IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

CASE NUMBER: [2023] EWFC 37 (B)

IN THE FAMILY COURT SITTING AT CHESTER CIVIL & FAMILY JUSTICE CENTRE

IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF:
CHILD "A" AND CHILD "B"

B E T W E E N:

A COUNCIL

Applicant

-and-

THE MOTHER

First Respondent

-and-

THE FATHER

Second Respondent

-and-

THE CHILDREN
(acting by way of Children's Guardian, Brenda Anglim)
Third and Fourth Respondents

JUDGMENT ON THE FATHERS APPLICATION TO CONSIDER THE MERITS OF PROCEEDING TO A COMPOSITE FINAL HEARING (INCLUDING FACT-FINDING AND INITIALLY LISTED FOR 5 DAYS)
HEARING DATE FRIDAY 17 MARCH 2023

MR HURLEY (instructed by A Council) appeared for the Applicant

MS CHAN (instructed by Pluck Andrew Solicitors) appeared for the First Respondent

MS HENTHORN (instructed by AFG Law) appeared for the Second Respondent

MS ROBERTS (instructed by Berksons Solicitors LLP) appeared for the children via their Children's Guardian

INTRODUCTION AND BACKGROUND

1 In these proceedings I am concerned for "A" born on [REDACTED] and age almost [REDACTED] and "B" born on REDACTED] aged almost [REDACTED]. They are the only children of the Mother and the Father.

2 This judgment concerns whether or not I should hold a 3-day fact finding and welfare hearing into an alleged non-accidental injury to "B". Although the application and the whole proceedings ultimately became uncontested shortly prior to the hearing, I have prepared a full detailed judgment as I considered that it was appropriate to detail the basis for my decision for the benefit of all parties, the IRO and indeed "B" in the future if she ever has questions.

3 The background can be summarised briefly. The basis of the Local Authority's application is that "B" has suffered a significant injury namely a skull fracture, and whilst the father offers an explanation by way of an unwitnessed accident, the initial medical opinion was that the injury did not match that of the description of the accident by the father. "B" was presented to hospital by her mother on 14 August 2022 after a lump was noticed by the father when bathing her. Upon examination a potential skull fracture was identified but no other injuries or markings of concern. The parents were interviewed under caution by the police on 15 August 2022. The family was not known to either [REDACTED] police or the Local Authority beforehand.

4 Both children remain living in the family home, with the maternal grandmother [REDACTED] caring for them initially by agreement following returning from hospital the following day and the parents living away.

5 The children remained voluntarily accommodated from the 15 August 2022 under Section 20 of The Children Act 1989, with supervised contact, until the Local Authority issued the application for care orders on 22 September

2022. The Local Authority did not seek any urgent or short notice hearing and the matter was therefore listed and first considered by the court on 12 October 2022 when I made an interim care order in respect of both children on an unopposed basis.

6 The Local Authority interim threshold asserted that the injury sustained by "B" was on balance of probabilities non-accidental (NAI) in causation as a result of:
i. Deliberate inflicted injury; and/or
ii. Reckless behaviours; and/or
iii. Lack of appropriate parental supervision; and, or
iv. Failure to protect,
v. The potential perpetrators, whether deliberately or otherwise, are asserted as the mother, and or the father.
vi. The mother and/or the father fail to adequately supervise the children at all times.

There is no final threshold document.

7 At the ICO / Case Management Hearing on 12 October directions were made for expert assessments by a Paediatric Neuroradiologist (Dr Fionnan Williams) and a Consultant Paediatrician (Dr Ian Mecrow). The Local Authority was directed to prepare a risk assessment of the paternal grandparents and others in order for them to assist the maternal grandmother for respite care and in supervising contact.

8 The matter was listed for a 5-day final composite hearing on 6 March 2023 and for an FCMH on 2 November 2022.

9 The following was also recorded in a schedule to the order of 12 October:

a) The Court noted this is a single-issue case and, on the evidence, presented to date:
i. there are no concerns in respect of the parent's parenting capacity, accordingly full parenting assessments are not necessary
ii. expert evidence is necessary and a composite finding of fact/welfare hearing is appropriate
iii. pre-proceedings was not appropriate
iv. paternal grandparents are not included in the interim threshold document as in the pool of possible perpetrators and so should be fully assessed.
b) The Court is open to what is in the best interests of the children and as long as full safeguarding measures are in place, with an interim care order and a working agreement, would expect the parents to be able to be

around their children whilst they are awake and being able to put the children to bed subject to supervision by appropriately assessed persons

10 On 3 November 2022, the Final hearing was relisted for 5 days on 3 April due to delays in obtaining the necessary evidence and the Guardian's availability. An IRH was listed on 24 March 2023.

11 At the hearing it was also agreed that the parents could return home, subject to supervision by the maternal grandmother.

12 The father's application, the subject of this judgment was uploaded to the JCM Portal on 9 February 2023, but this does not seem to ever have been processed. It was not brought to the attention of the court or myself until I received an email from the father's solicitor on Thursday 9 March 2023. I immediately listed the matter for consideration the following day and then directions for this hearing on 17 March.

13 I specifically did not rush and proceed with a contested hearing on 10 March but listed it on 17 March to allow the parties sufficient time to prepare fully detailed skeleton arguments.

THE FATHER'S APPLICATION

14 The Father, having considered and received advice upon the contents of Dr. Mecrow's and Mr Williams reports invited the Local Authority to review the medical evidence and consider the merits of pursuing their application. in the absence of a substantive reply the father issued an application to the court inviting the court to consider dismissing the Local Authority's application for Care Orders and to consider the merits of proceeding with this application and the listing of the 5-day final hearing, commencing on 3rd April 2023.

15 The application was supported by the mother and opposed by the Local Authority and by the Guardian, but the Guardian's position later reversed and she indicated that she did not consider a Finding of Fact was necessary.

16 Thereafter the Local Authority reconsidered the matter and requested in their final position statement of 17 March that the application by father should be paused until the IRH on 24 March. "*That the case still runs as active proceedings and the Local Authority is allowed to resubmit final evidence and a support plan at child in need level that has been shared and agreed by the multi agency prior to the IRH on the 24th March 2022*

with a recommendation to end proceedings with no order, however all process and consideration of the child in need plan can be considered.

… the Local Authority's position has altered in that we no longer deem a Care Order necessary on conclusion of proceedings and whether a finding is made of the injury being accidental or non accidental the local authority deem a level of supervision and monitoring to be the most appropriate way forward. In regards to the lesser order principal this support does not have to be dependent on a Care Order. In addition a Care Order wouldn't offer additional services it would only ensure that the Local Authority shares parental responsibility. The Local Authority would not be seeking removal in any event of findings and as such accepts the court has to consider if a fact finding is proportionate and whether it also impacts on the nature of the order made.

…The Local Authority wish to conclude with a recommendation to the court of a final care plan to be one of No Public Law Order and a recommendation of a child in need plan.

… The Local Authority request to listing remaining for IRH so that the multi agency with parents can be pulled together to agree the child in need plan and ensure that the professionals such as the health visitor, school and nursery along with grandmother can support, to end without seeing the proceedings to IRH leaves the family and professionals blind to the plan."

17 After an advocates meeting on 17 March 2023, I received an email from Mr Hurley in the following terms, summarising the parties' positions:

- *"Although the LA had proposed a CIN Plan for 3 months, I have spoken with the SW who has confirmed he does not think threshold for CIN will be met and this had been offered on the basis the parents agreed CIN, which I am now told they do not. CG is also of the view threshold for CIN is not met.*
- *The SW accepts that given the LA's current position, there is no basis for the LA to propose ICO / continued supervision should continue in the event the matter remains listed for IRH next week. Parents are clear the ICO and supervision should end today and proceedings should conclude today.*
- *The only issue raised by the SW in respect of the matter remaining listed for IRH is that the IRO has not been consulted in respect of the LA no longer being of the view a finding of fact hearing is necessary. This will be a matter for the court and all parties are agreed in any event there should be a judgment in this matter."*

THE HEARING

18 The hearing took place briefly via teams with skeleton arguments or position statements filed by all parties and brief oral submissions. At the request of the parties and since the IRO had not been consulted about the change of plans (currently on leave), I was requested to prepare a written judgment which I had indicated had intended to prepare in any event. In my judgment, with an unexplained injury as serious as this it is important that there is detailed consideration of the matter and any decision to conclude the proceedings without an IRH or final hearing. It is important for all parties to know that there has been thorough judicial oversight.

19 The Local Authority were represented by Mr Hurley of Counsel, the mother by Ms Chan, the father by Ms Henthorn and the Guardian by Ms Roberts. The social worker, parents and Guardian were also present.

20 I heard brief submissions from all parties. The only issue which required adjudication today was whether I would retain the IRH date so that the IRO could be consulted. My decision was to vacate the hearing, discharge the Local Authority's application for a Care Order and I gave very brief reasons and the outline of my decision to the parties.

THE MEDICAL AND OTHER RELEVANT EVIDENCE

A MEDICAL EVIDENCE

21 The medical evidence is contained in the bundle at section E. I have considered it all in detail although I will only assess certain parts in my judgment. It has nevertheless all been taken into account in making my decision.

22 When "B" was first presented at hospital by her mother she was initially seen by [treating paediatrician]. He noted the presence of a large boggy swelling on "B"'s head. He noted that there was no account of any trauma given by "B"'s mother. "B" did not seem to be in pain, was not drowsy or vomiting and there was no redness of the lump. He considered the possibility of a congenital abnormality to explain the swelling, it was considered important to rule out non-accidental injury by conducting a CT head scan.

23 Following the CT head scan, "B" underwent review by Dr K Paediatric registrar at 04.50 on the morning of the 15 August 2022. Together with Paediatric registrar Dr G, a joint report dated 16 August was prepared. This set out the mother's history of events at paragraph 3 and the

observed abnormalities at paragraph 11. The only relevant observation was the *"Lump (number 1) 6x6, 5cm boggy ovoid lump on left side of head. 0.5cm raised from scalp. Not tender. No skin colour change."* Due to the concern that the swelling and fracture were unexplained "B" underwent further investigations.

24 They were unable to determine the cause of the injury or whether it was accidental or not. There were no findings possible as to the timing of the injury.

25 A skeletal survey was carried out on the 17 August 2022. [REDACTED] (Consultant Radiologist) reported, and the skull fracture was confirmed but no other acute or healing fractures were seen. The images and an MRI were reviewed by Dr L, Consultant Paediatric Radiologist at [REDACTED Hospital]. She confirmed: "*Skull fractures cannot be dated radiologically. Fractures do not occur in normal infants as a result of normal handling or exuberant play. Skull fractures typically occur in independently mobile children as a result of a fall from a height and an impact with a hard surface or as a result of a direct blow.*

It is possible that an independently mobile child, of this age, could sustain this injury as a result of an unwitnessed event but I would expect the child to show distress at the time of the injury such that any carer would have been aware that a significant and memorable event had occurred.

In the absence of a clear and satisfactory account of the mechanism of trauma or a medical explanation for the fracture, inflicted injury must be considered."

26 All the enquiries confirmed a linear skull fracture of the left parietal bone with overlying soft tissue swelling. Incidental finding of Chiari type I malformation.

27 Blood test results and basis bone chemistry were normal. Medical investigations required "B" to have a CT scan, MRI Scan, Child Protection Medical, two Skeletal Surveys and routine blood testing. All these failed to identify any medical explanation for the injury.

28 On 5 October Dr G filed an addendum which updated "B"'s medical notes. Father's explanation (referred to later) had been supplied to him and he stated *"I have been made aware of "B"'s father statement regarding "B"'s possible unwitnessed fall in their garden near a paving stone path on the 14th of August 2022.*

In my opinion and in view of all the contextual information gathered so far, it is possible that "B"'s injury could have been accidental during this event. Nevertheless, this remains an unwitnessed event and therefore I am unable to attribute any degree of certainty to this."

29 Thereafter the reports of the court appointed experts have been shared. Dr Mecrow was supplied with the independent report of Dr Williams dated 5 November 2022 and reported on 20 December 2022.

30 Dr Williams confirmed the presence of a left sided scalp soft tissue injury with left parietal skull vault fractures and noted the view that these were traumatic injuries due to blunt impact trauma. On the MRI scan dated 1st September 2022, there was persisting evidence of the left scalp haematoma but no intracranial or subdural collection.
He went on to say that because soft tissue swelling generally persists for 14
days in total, this would indicate that the impact which caused the scalp soft tissue injury occurred in a 14-day period before the CT scan was performed.

31 Dr Williams considered three possibilities including that the episode in the garden did cause the fracture, that there was another accidental episode responsible for the fracture or that the injury had been inflicted and noted that the radiology findings could not distinguish or differentiate between the three possibilities.

32 Dr Mecrow had had the opportunity to consider the report of Dr Williams prior to preparing his own report. He prepared a detailed Opinion/Discussion. He was firmly of the opinion that the swelling was a result of the fracture and went on to say that "*To my mind, [this] research strongly suggests that whilst some skull fractures will be associated with readily identifiable swelling, others may demonstrate more subtle swelling which would not easily be appreciated by any carer or examiner."….*

My view is that it is entirely plausible that even an attentive carer might not recognise that there was any abnormality in the immediate period after a fracture had been sustained."

33 When discussing symptoms, he stated:

51. The Court will no doubt be well aware that skull fractures are otherwise generally not associated with specific symptoms. There may be local pain at the site of the fracture, but in contrast to long bone fractures,

there is commonly no major change in behaviour which might otherwise lead a carer to suspect that an injury had been sustained.
52. Unfortunately, there is little that can be done to assist the Court with narrowing the period in which the skull fracture was sustained from the clinical features taken in isolation.
53. Whilst a matter for the Court, I would make the following observations. I could well imagine that any parent might not have suspected that a fracture had been sustained by a small child from a low level fall. There would be widespread understanding within the lay population of the low level falls are generally benign events.
54. The situation with regard to the presence of a swelling is somewhat different. My experience is that carers are alarmed by the discovery of any swelling on the scalp, especially where this appears soft or yielding (boggy) to the touch. This is because we know full well that the bony skull underneath the scalp means it is usually hard to the touch.
55. The court will therefore need to take into consideration the fact that in some cases, the feature that leads to the presentation of a child for medical review is not necessarily either the fall or the immediate appearance or feel of the scalp, but is the softness of the swelling some days later.

34 He further discusses the issue of skull fractures in falls from low levels as being reported at 1% but considers that *"as there are few symptoms which result from skull fractures and because the swelling may not always be appreciable, it is entirely plausible that a number of skull fractures sustained in accidental falls went unrecognised and that children did not undergo radiological investigation. In my view, it is likely that the proportion of children who sustain fractures from low level falls is somewhat higher (perhaps a percentage point or two) than the 1% figure, although it would remain the case that only a small minority of children would sustain a skull fracture from a low level fall."…..*

59 "As long ago as 1984, Hobbs sought to identify the features of fractures which might be taken as pointing towards accidental or non-accidental mechanisms (Skull Fracture in the Diagnosis of Abuse, CJ Hobbs. Archives of Disease in Childhood, 1984, 59;246-252). He noted the following comment:

- ***Accidents usually resulted in single, narrow, linear fractures, most commonly of the parietal bone, with no associated intracranial injury.***

60. My understanding is that this is exactly the type of fracture sustained by "B"."

35 As far as “B” herself is concerned
“61. “B”’s father and mother have identified a possible instance of a fall as the cause of the fracture. At 2 years old, “B” would have been fully mobile and would have been starting to run and jump. She would have had the neurodevelopmental capability to have manoeuvred herself into a position where she might have fallen.”

36 He further discusses the research data and factors which may influence force to the skull from even a low level fall including the surface the fall is to and the height and states that “*It seems reasonable and logical to me to extrapolate from this data that falls from a much lower level than 1 metre can exceptionally cause an injury such as an isolated skull fracture…..*

[It]…is simply impossible to estimate the effect of speed, force of impact and how much a child’s fall will be broken by putting their hands out in terms of this altering the forces sustained in an accidental fall.”

37 He confirms that “B” would have cried and been notably upset for some minutes after the fracture had occurred and that it would have been memorable to an adult with care. However, if soothed or cuddled she is likely to have stopped and then appeared completely normal.

38 In respect of the father’s account he states:

65…The court will need to assess the account given by [the father] of “B”’s response to the fall, but it seems to me that this was broadly consistent with a significant incident having taken place.

66. The possibility that “B” sustained the fracture as a result of a fall exists and cannot be discounted. However, I believe that it would be perverse of me (and potentially misleading to the Court) to prefer this mechanism as the cause because this would require me to advise that an unusual injury was likely to have resulted from an unidentified minor fall. This is matter for the Court.”

67. Put simply, skull fractures relatively commonly occur after both accidental and nonaccidental mechanisms and there is nothing about this fracture from a medical point of view which allows me to advise the Court that accidental or non-accidental mechanisms are more likely.

39 In his executive summary, he confirms that “*Skull fractures are of relatively low value in making a diagnosis of non-accidental injury given that they relatively commonly occur after simple accidental episodes of trauma such as a fall from even low levels.”*

40 *When answering specific questions, he states:*
"Unfortunately, whilst the characteristics of this fracture are entirely in keeping with them having been caused by an accidently episode, they are equally in keeping with a non-accidental mechanism. I do not think that the fact that the fracture was single, linear, not depressed and involved the parietal bone with no associated intracranial injury could be taken to indicate that a non-accidental mechanism was less likely than an accidental mechanism.

41 *He further stated "From my perspective, I would not have advised the court that there had been a failure of "B"'s parents to protect her. I should advise that in forming this view I have considered the accounts of "B"' falling to have been correctly recounted by her parents. I have also formed the view that "B" did not seem to display symptoms which might have alerted a parent to the fact that she had sustained an injury before the swelling had developed.*

42 In summary therefore, the medical evidence is inconclusive and neither the explanation of accidental nor of non accidental injury is more probable than the other.

B OTHER EVIDENCE

43 In addition to the medical evidence, the court has the benefit of a variety of other evidence from various sources. These include police disclosure, the parents own statements, the Local Authority parenting assessment and the Guardian's final analysis.

44 The police evidence consists of the transcripts of interviews with the mother and father, the transcription of the 911 phone call and photographs of "B". The parents were interviewed under caution by the Police on 15.08.2022 when they each attended voluntarily. The father provided an account for the family's movements over the course of Saturday 13.08.2022 and Sunday 14.08.2022 including noting "B" had a fall on Sunday 14.08.2022 in the garden where she banged her nose but was easily consoled.

F…I remember "A" and "B" were running around the garden. So, it's all grass, it's not massive, erm, but there are… there's some paving stones so like that lead like a pathway to… up to the patio area. So, I was putting the food out, so I didn't see what happened or how she fell over, but she's… suddenly you hear a cry and she's sitting on one of these paving

stones, erm, crying. Not like, "Oh my god, what's that? Terrible, it's just a normal, she's fallen over and—
DC A: Yes.
F: —cry.
So, I've gone over to her cos I think [M]'s in the kitchen sorting food, so I've gone over, got to her first, erm, picked her up and like reassured her, and I've said, "What hurts?" I couldn't see anything on her, I gave her a quick look, but I didn't spend ages, but what hurts, and she said, "I've hurt… banged my nose," she said. So, I though it was a bit odd about how… and there wasn't any mark on her, so, erm, but again, she stopped crying like really fast, which "B" does tend to do, she's recovered a bit more. But that was… it wasn't anything that made me think… and also, I'd no idea how she would have got from that, how she would have ended up with a bang on the top of her head cos she's—
DC A: How was she sitting when you went over to her?
F: Literally then like cross legged, cross legged with her arms in the air, waiting to be picked up.
…. she wasn't even that fussed. We literally just put her down in front of the food and she stopped crying immediately.

45 In his first statement of 5 October the father confirms that he considers that the fracture was as a result of the (unseen) fall in the garden.
"I picked her up and gave her a hug and a kiss. I checked her all over and couldn't see any blood or any other sign of injury on her and I didn't see or feel any lump on her head. Once she'd stopped crying I asked her if she'd banged anything and she replied 'my nose'. As I couldn't see any sign of injury I presumed it was not serious. I took her over to the table and sat her down to eat. She ate normally and seemed perfectly fine for the rest of the evening. I didn't feel it was necessary to tell [M] about the fall as I'd been able to comfort "B" and she appeared to be absolutely fine"…

Later that evening, I was giving the children a bath when I felt a lump on "B"'s head. I called [M] in to take a look. We were both terrified that it was something very serious like cancer as she was perfectly fine otherwise, so we decided to call 111 for their medical opinion. [M] also contacted her mum to ask her to come over to the house to walk our dog as I would need to stay at home with "A" whilst [M] took "B" to the hospital.
When she arrived, [M]'s mum also shared our concerns that the lump might be something very serious such as cancer and strongly supported our decision to take "B" to A&E…

I did not link the fall to the lump at the time because, as far as I was concerned, she hadn't appeared to have suffered any injury and as such did not consider it a significant incident. There were no marks on her, she

did not present any common symptoms of a head injury, her behaviour for the rest of the evening was completely normal and she showed no discomfort at all when touching the lump and I was extremely worried that a painless lump could be cancerous."

46 His position is unchanged, he maintains that the fracture must have been caused by an unobserved accidental injury. He denies that there was ever a lack of supervision; children can, and do, fall and hurt themselves. He denies that they failed to seek medical care. They did so as soon as they were concerned, after seeing the lump on "B"'s head. Indeed, so concerned were they that they ignored the advice given via 111 and took "B" to hospital that same evening after they saw the lump.

47 The mother's police interview did not contain any information about the fall as she was unaware of it. She stated that the father had called her when he had discovered the lump and "B" was not showing any distress. She was, however concerned and decided to phone 111 "*and then yes, when I was on the phone to 111, that's when I text my mum, because I'm thinking it's head, it's massive and they're going to tell me to go to A&E…*

I'd hung up the phone to 111 and they told me nothing to worry about, give your GP a call and book a non-emergency appointment. So my mum came in and we said, "Oh, she's got a lump but we've been told not to go in, I'm not sure if that's right," so mum felt the lump and said, "Well, if you've been told not to go in, you've got to do what you feel you have to do," like you know, make sure that you're comfortable with what you're doing. So […] and I both said that we need to go to A&E…"

48 In her first statement she stated that she was only informed about the falling incident by the father after the police interviews had taken place. She has no personal knowledge of it. She accepts father's description of events and points out that there was no other incident which could have caused the injury.

49 The court has now received the Child and Family Assessment (undated but recent) and the Local Authority Final Statement dated 17 February 2023. They raised some concerns that they *"have been very cautious and somewhat closed in their responses to questions and requests for information. This may be understandable given that the children have experienced changes in social workers, with myself being the fourth allocated social worker. It is likely the parents have been frustrated by having to repeat information and answer questions already asked, however, I have been clear with them that I needed to hear the information*

for myself and did not automatically go back to information written by other social workers in the first instance.

The parents have questioned every step taken by the Local Authority despite being fully legally represented and again whilst this may be understandable as they have never had any social care interventions before, it has meant delay in completing work including words and pictures work with the children.
There are some concerns regarding [the mother and father']s ability to work openly and honestly with professionals and, during these proceedings, they have actively prevented the Local Authority from visiting the children."

These appear to be the height of the Local Authority concerns except for the unexplained injury of course. The parents completely deny these allegations stating that they have never refused a visit and confirming weekly visits from the Family Support Worker. At the height of the local authority's case, they remain mere "concerns"

50 The CAFA did not identify any vulnerabilities concerning the parents' ability to care for their children.

51 The Final Evidence Statement of the Local Authority was: "*It is the view of the Local Authority that the medical evidence from Dr Williams and Dr Mecrow is finely balanced and the Court will have to make a determination and whether it is safe for the children to be returned to their parents' care.*

Should no findings be made that the parents deliberately caused the injury to "B", reunification with No Order would be the preferred plan of the Local Authority.

If findings are made that either parent deliberately caused the injury to "B", this has been assessed by the Local Authority as the best option for the children at this time. Further risk assessment would be needed to consider the findings identified within the proceedings and a support plan that would be put in place to reduce the risk of further injury. Consideration of parents ability to accept the finding/s and each others ability to protect and support would be needed within a support plan for the family. Give the children have remained within the family network throughout the proceedings removal isn't seen as proportionate."

52 In short, the decision taken by the Local Authority was that the children would remain living with their parents whatever the finding made regarding

the injury. The only difference would be the existence of an order and / or a support plan.

53 The IRO stated "*I agree with the Local Authority proposed plans for "A" and "B". In the event that any findings are made against either [the father] or [mother] there will need to be further assessment and planning to determine what the day to day arrangements under the Placement with Parent Regulations would be. In the event of a Care Order being granted, I would continue to have oversight through the cared for review process.*

In the event that no findings are made, I agree that no order is necessary, and the Local Authority will have no further involvement."

54 The Guardian's final analysis confirmed that she considered the Local Authority's plan to be inchoate due to the need for further assessment of any findings which were made. She considered that it may not be "*in the best interests of the children for this matter to conclude before the court is made fully aware of the permanency plans for the children, should they be required."*

55 Initially she supported the Local Authority's position in opposing the application and to avoid an appeal, requested a hearing when there was time to everyone to consider the evidence and for each party to file skeleton arguments. A final hearing, she stated, *would "ensure that the court has the opportunity to hear all the evidence and make findings either way which will then be compliant with all the parties Article 6 & 8 Rights are observed and complied with."*

56 Her final skeleton argument for this hearing took a different position. Having had additional time to consider the matter and the case law, "*the Guardian forms the view that it is neither necessary nor proportionate to hold a finding of fact hearing… that it is unlikely the court would find the injuries to have been caused non accidently".*

57 As already mentioned, the Local Authority ultimately agreed with the Parents and the Guardian that a finding of fact hearing was not necessary. Initially they sought for the matter to be concluded at the IRH with a Child in Need plan but by the time of the hearing they had accepted that this was not to be pursued.

58 I set out the final positions of all parties at Section 17 of this judgment.

59 It is agreed by all parties that there are no risk factors or red flags concerning either parent in this case, such as those which were set out by

Peter Jackson J (as he then was) in Re BR (Proof of Facts) [2015] EWFC 41.

THE LEGAL FRAMEWORK

60 In considering this application, I start with the principles in the Family Procedure Rules 2010 ['FPR'] and specifically the overriding objective at FPR r1.1, which includes ensuring that the case is dealt with expeditiously and fairly, proportionately, and with fair allocation of resources.
FPR r1.1 states:
(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
(2) Dealing with a case justly includes, so far as is practicable –
(a) ensuring that it is dealt with expeditiously and fairly;
(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
(c) ensuring that the parties are on an equal footing;
(d) saving expense; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

61 There have been a number of recent cases which are of particular relevance to this application as well as others with limited or indirect impact. I intend to address these in some detail in this judgment and set out where I consider that there are pertinent similarities or differences in my analysis, below.

62 Under rule 29.4(2) of the Family Procedure Rules 2010, a local authority may only withdraw an application for a care order with the permission of the court.

63 The legal position was very usefully summarised by the Court of Appeal in *GC (A CHILD) (WITHDRAWAL OF CARE PROCEEDINGS) [2020] EWCA Civ 848 para 16 - 20* and I will set this out here:

64 *This requirement [29.4(2) FPR] has been in force (in an earlier incarnation in the Family Proceedings Rules 1991 now repealed) since the implementation of the Children Act 1989. We were only referred to one case in which the provision has been considered by this Court, in the early days of the Act – London Borough of Southwark v B [1993] 2 FLR 559 in which at page 573 Waite LJ set out the following approach:*

"The paramount consideration for any court dealing with [an application to withdraw care proceedings] is accordingly the question whether the withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned. It is not to be assumed, when determining that question, that every child who is made the subject of care proceedings derives an automatic advantage from having them continued. There is no advantage to any child in being maintained as the subject of proceedings that have become redundant in purpose or ineffective in result. It is a matter of looking at each case to see whether there is some solid advantage to the child to be derived from continuing the proceedings."

This approach is consistent with s.1(5) of the Act, which provides that:
"where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."
17. Since then, the provision has been considered by judges of the Family Division in a number of cases at first instance, in particular in A County Council v DP and others [2005] EWHC 1593 (Fam) (McFarlane J, as he then was), Redbridge London Borough Council v B and C and A [2011] EWHC 517 (Fam) (Hedley J), Re J, A, M and X (Children) [2014] EWHC 4648 (Fam) (Cobb J), and A Local Authority v X, Y and Z (Permission to Withdraw) [2017] EWHC 3741 (Fam) (MacDonald J). The latter three cases were decided following the implementation of the Family Procedure Rules 2010 which, unlike their predecessors, include the overriding objective in rule 1.1.
18. For my part, I would endorse the approach evolved in these first instance decisions, which can be summarised as follows.
19. As identified by Hedley J in the Redbridge case, applications to withdraw care proceedings will fall into two categories. In the first, the local authority will be unable to satisfy the threshold criteria for making a care or supervision order under s.31(2) of the Act. In such cases, the application must succeed. But for cases to fall into this first category, the inability to satisfy the criteria must, in the words of Cobb J in Re J, A, M and X (Children), be "obvious".
20. In the second category, there will be cases where on the evidence it is possible for the local authority to satisfy the threshold criteria. In those circumstances, an application to withdraw the proceedings must be determined by considering (1) whether withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned, and (2) the overriding objective under the Family Procedure Rules. The relevant factors will include those identified by McFarlane J in A County Council v DP which, having regard to the paramountcy of the child's welfare and the overriding objective in the FPR, can be restated in these terms:

(a) the necessity of the investigation and the relevance of the potential result to the future care plans for the child;
(b) the obligation to deal with cases justly;
(c) whether the hearing would be proportionate to the nature, importance and complexity of the issues;
(d) the prospects of a fair trial of the issues and the impact of any fact-finding process on other parties;
(e) the time the investigation would take and the likely cost to public funds.

65 I have referred to GC above, where the conclusion of the Court of Appeal was:
"…the application made by the LA should not have been made and that the judge was wrong to grant permission to the LA to withdraw the application. Looking at the written medical evidence alone as available to the judge at the case management hearing, the Court of Appeal found that it was not possible for the lower court to conclude that the test for granting permission to withdraw the proceedings was satisfied.

The Court of Appeal also made clear that a judge does not look at evidence in isolation. Each piece of evidence must be considered in the context of all the other evidence (Re T [2004] EWCA Civ 558, [2004] 2 FLR 838), and that whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence (A County Council v K, D & L [2005] EWHC 144 (Fam) at paragraphs 39, 44 and 49).

The Court of Appeal reiterated that the role of the judge is crucial, as observed in Re S (A Child) (Care Proceedings: Surrogacy) [2015] EWFC 99 (at paragraph 124):

'It cannot be over-emphasised that it is the judge, not an expert or group of experts, who has the responsibility of making the findings in family cases involving allegations of child abuse. Only the judge hears the totality of the expert evidence, including cross-examination by specialist counsel which often, as in this case, brings to the fore issues that are less apparent from the written reports. Only the judge considers all the expert evidence together, and has the opportunity to identify strands and patterns running through that evidence. And only the judge is able to consider all of the evidence – including expert medical evidence and the testimony of family members and other lay witnesses.'

In the view of the Court of Appeal this is a 'paradigm example' of a case where a judge needs to hear all the evidence, to assess whether the lay witnesses' evidence is truthful, accurate and reliable, and evaluate the

medical opinion evidence, tested in cross-examination, in the context of the totality of the evidence, and that it was simply not possible for the judge to reach a conclusion as to the cause of G's injuries on the basis of the written evidence alone. It was impossible for the judge in this case to conclude that the case fell into the first category, namely that there was 'insufficient evidence to cross the threshold', and in those circumstances, the judge had to consider the factors identified by McFarlane J in A Local Authority v DP. Applying those factors to this case, it is clear that the fact-finding hearing was required and must go ahead.

In short, the Court of Appeal concluded that having regard to the child's welfare as the paramount consideration, and the overriding objective in FPR r.1.1, it is plain to that the fact-finding hearing should go ahead and that the local authority's application to withdraw the proceedings should have been refused.

66 I have also considered the leading and most frequently cited authority on the issue of whether to hold a finding of fact hearing, being Oxfordshire County Council v DP, RS and BS [2005] EWHC 1593, where Macfarlane J, at para 24, states: *"The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact-finding exercise:*

a) The interests of the child (which are relevant but not paramount)
b) The time that the investigation will take;
c) The likely cost to public funds;
d) The evidential result;
e) The necessity or otherwise of the investigation;
f) The relevance of the potential result of the investigation to the future care plans for the child;
g) The impact of any fact finding process upon the other parties;
h) The prospects of a fair trial on the issue;
i) The justice of the case.'

67 Another recent authority is H-D-H [2021] EWCA Civ 1192 where at paragraph 22 Peter Jackson LJ referred to the Oxfordshire case and Considered and expanded the relevant considerations:
"The factors identified in Oxfordshire should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case. For example:
(i) When considering the welfare of the child, the significance to the individual child of knowing the truth can be considered, as can the effect on the child's welfare of an allegation being investigated or not.
(ii) The likely cost to public funds can extend to the expenditure of court

resources and their diversion from other cases.
(iii) The time that the investigation will take allows the court to take account of the nature of the evidence. For example, an incident that has been recorded electronically may be swifter to prove than one that relies on contested witness evidence or circumstantial argument.
(iv) The evidential result may relate not only to the case before the court but
also to other existing or likely future cases in which a finding one way or the
other is likely to be of importance. The public interest in the identification of
perpetrators of child abuse can also be considered.
(v) The relevance of the potential result of the investigation to the future care
plans for the child should be seen in the light of the s. 31(3B) obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met.
(vi) The impact of any fact finding process upon the other parties can also take account of the opportunity costs for the local authority, even if it is the party seeking the investigation, in terms of resources and professional time that might be devoted to other children.
(vii) The prospects of a fair trial may also encompass the advantages of a trial now over a trial at a possibly distant and unpredictable future date.
(viii) The justice of the case gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account. One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact-finding hearing. The level of seriousness of the disputed allegation may inform this assessment. As I have said, the court must ask itself whether its process will do justice to the reality of the case."

68 One of the other particularly relevant and recent case is that of *Derbyshire County Council v AA & Ors [2022] EWHC 3404* (Fam) Lieven J. The judge addressed also the recent private law case *of K v K [2022] EWCA Civ 468* by the Court of Appeal. At paragraph 66 of that judgment, the Master of the Rolls says:
"the main things that the Court should consider in deciding whether to order a fact-finding hearing are: (a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order, (b) that the purpose of fact-finding is to allow assessment of the risk to the child and the impact of any abuse on the child, (c) whether fact-finding is necessary or whether other evidence suffices, and (d) whether fact-finding is proportionate."

69 I agree with Lieven J ‘s contention that those principles as to whether a fact-finding is necessary and proportionate (to determine what, if any, welfare orders should be made) are equally relevant to public law.

70 The main and crucial difference of course is that in public law proceedings threshold findings need to be made out before any public law orders can be made – in essence if there is no acceptance by the parents of threshold (as here)and there are no facts found, there is no jurisdiction to make public law orders. That does not alter the Court's approach that a finding of fact hearing should not be undertaken unless it will make a material difference to the welfare outcome and the orders which may be made.

71 Lieven J stated that: *‘The fundamental purpose of public law proceedings is to determine what public law orders are needed for the welfare of the child and to protect the child from future risk. Understanding the facts and circumstances of an alleged non-accidental injury is often critical to the determination of future risk.’*

ANALYSIS OF THE LAW AND APPLICATION TO THIS CASE

72 Firstly, I will record that despite the outcome of the application today the decision by the Local Authority to issue proceedings was entirely appropriate and justified.

73 In coming to my decision I have carefully considered each of the recent Senior Court authorities and applied then to the facts of this case. I do not intend to address each point slavishly, but I will address what I consider to be the most important and relevant facts here which have supported my conclusion. I have particularly considered Peter Jackson LJ’s comments and guidance in *H-D-H 2021* to approach the Oxfordshire factors flexibly in the individual case. I have also considered the over-riding objective.

74 Delay is not a significant factor in deciding whether to proceed with the final hearing or not as it is now listed for a few weeks time, with the IRH on 24 March.

75 Cost to public funds is of course relevant – but the final hearing was listed for only 3 days and no further fees for experts were to be incurred. Cost is not therefore a significant consideration.

76 The 3 days court time for the final hearing and the IRH are a valuable resource, and the time could be utilised for other cases if this matter was concluded.

77 Whilst ideally “B” would wish to know the truth (if she ever finds out about this matter) she is a baby and in reality, it will not impact upon her – especially since the issue cannot be resolved in any event. I discount this.

78 This is a single issue case, there were and are no other concerns about the parents care of the children which have ever needed the input of the Local Authority. The only issue is a single unexplained – but both serious and significant – injury to “B”. Since the discovery of the injury, the parents have been subject to very considerable oversight by the Local Authority and their time with their children has been supervised. This is presently for a total of 7 months, although proceedings were not issued until 5 weeks after the incident and an urgent hearing was not requested. That was inappropriate delay of almost 2 months and the Local Authority should not have attempted to manage the case outside the court arena. Proceedings should have been issued immediately to avoid unnecessary delay and a swift hearing sought. The delay in issuing will have added to the distress of the parents and children.

79 No party sought to challenge the evidence of the experts and the experts were in agreement – this also includes the original treating medics. Indeed, all parties to the proceedings agreed with the experts reports and no-one sought for them to give evidence at a hearing. There were also no questions asked of them and no need for a professionals meeting. On this basis the composite final hearing was reduced to 3 days from 5. Had the hearing proceeded their evidence would not have been tested in any event. Put simply the experts accept that the father’s version of events is plausible and they cannot say either way whether the injury was accidental or non-accidental in nature.

80 The parent’s position and evidence has not changed and the explanation the father gives for delay and not immediately realising the potential from the unobserved fall is plausible.

81 This is one of those rare cases where the expert evidence could not satisfy the threshold criteria in s.31 of the children Act 1989. Additionally, there is very little, if any, other relevant evidence which could lead to the making of findings short of the mother or father admitting causing harm to “B”, something which was most unlikely.

82 Accordingly, it is highly unlikely that the court would be able to consider that threshold was crossed to justify the making of any public law order.

83 The local authority plan, whatever the outcome, was placement at home with the parents, they would not be seeking removal in the event of findings Indeed, their final evidence had ruled out any other placement:

"Presently the Local Authority would seek to place with parents and regulate
(Placement with Parents/Care Planning, Placement and Case Review (England) Regulations 2010). ……. If findings are made that either parent deliberately caused the injury to "B", this has been assessed by the Local Authority as the best option for the children at this time."

The issue therefore would be whether the Local Authority could justify needing a care order or not. I have struggled to find any justification for the need for a care order in these proceedings. As I have already stated there are no other concerns regarding the parents. The Local Authority eventually themselves questioned what intervention is needed with this family. They have a parenting assessment and observation throughout the past 7 months with no other issues in regard to parenting capacity, needs of the parents, areas of challenge and additional issues or recommendations of services and support required within the assessments. The concerns solely remain about whether the injury has been non accidental.

84 The Children Act 1989 s. (5) states "*Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."*

85 I have also considered the Local Authority's initial potential plan for a Care order with the children placed at home if findings were made. The Public Law Working Group Report 2021 clearly recommended that only in exceptional circumstances should such a plan be approved and reminded practitioners that the "making of a final care order must be a necessary and proportionate interference in the life of the family". The report concluded that "*it should be considered to be rare in the extreme that the risks of significant harm to the child are judged to be sufficient to merit the making of a care order but, nevertheless, the risks can be managed with a care order being made in favour of the local authority with the child remaining in the care of the parents/carers".* I accept that the report is guidance.

86 In my judgment this is not an exceptional case, nor would it be proportionate for the order to be made – even if the Threshold could be

satisfied. A Care Order would not offer any additional services, it would only ensure that the Local Authority shared parental responsibility.

87 The Local Authority then suggested adjourning the matter to the IRH for consideration of resolving the proceedings on the basis of a “Child in Need Plan,” which they believed the parents were agreeable to. In fact, they did not agree and the Local Authority accepted advice that the threshold for a Child in Need intervention was not met. The Guardian agreed. Ultimately this was not pursued.

DECISION AND ORDER

88 Therefore all parties agreed, possibly with some reluctance, that the only issue outstanding was whether the matter should be resolved today or whether it should wait a week until IRH so that the IRO could be consulted. In my judgment this is un-necessary delay and will cause further distress to the parents. If the IRO is unhappy with the decision, then she has the right to seek legal advice.

89 Whether or not a particular fact-finding exercise is conducted is a question for the court’s discretion and is not a matter of lawfulness. I am entirely satisfied that a fact finding exercise in these proceedings is unnecessary, the threshold is not met and the Local Authority’s application for Care orders should be dismissed.

90 I so order.

HHJ Hesford
20 March 2023